IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 386 OF 2013
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

ELVIS MWEEMBA APPELLANT

-VS-

THE PEOPLE RESPONDENT

CORAM: **WANKI, JS, LISIMBA AND LENGALENGA, AG. JJS**
On 3rd December, 2013 and 10th March, 2014

For the Appellant: Mr. K. Muzeng'a, Principal Legal Aid Counsel

For the Respondent: Mrs. N.M. Bah Matandala, Senior State Advocate

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J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:-

1. **Bernard Chisha -Vs- The People (1980) ZR 36.**
2. **Emmanuel Phiri and Others -Vs- The People (1978) ZR 79.**
3. **Goba -Vs- The People (1966) ZR 113.**
4. **Zulu -Vs- The People (1973) ZR 326.**
5. **Emmanuel Phiri -Vs- The People (1982) ZR 77.**

STATUTES REFERRED TO:-

6. **The Juveniles Act Chapter 53 of the Laws of Zambia.**

This is an appeal by the appellant against his conviction. The appellant was convicted on one count of Defilement, contrary to **Section 138(1) of the Penal Code Chapter 87**

of the Laws of Zambia as read with **Act No. 15 of 2005.** The Particulars of the offence were that, the appellant on unknown date but between the 1st day of August, 2010 and the 30th day of November, 2010 at Lusaka in the Lusaka District of the Lusaka Province in the Republic of Zambia, had unlawful carnal knowledge of Phinet Lifuna a girl under the age of 16 years by the Subordinate Court of the first Class Holden at Lusaka and sentenced to 15 years Imprisonment with hard labour by the Lusaka High Court.

The appellant's conviction was based on the evidence of five witnesses; namely, Harriet Mutinta Muchimba, PW1; Loveness Lifuna, PW2; Mbunji Choma, PW3; Phinet Lifuna, PW4; and No. 33978 Detective Inspector Anthony Bwalya Mulenga, PW5.

The evidence of PW1 was that on 16th December, 2010 Inspector Mulenga went to Balmoral Basic School where he worked as a Teacher to request for attendance register for Grade 3 to know the age of the child named Phinet Lifuna and to confirm if she was a pupil at the School.

PW1's further evidence was that according to the register Phinet Lifuna was born in 1996, and her guardian was Tedias Tembo.

The evidence of PW2 was that the victim Phinet Lifuna was her granddaughter and she started living with her in 2006 as her biological mother died and her biological father was in Mazabuka; and that the victim was born in 1996.

PW2's further evidence was that on 17th November, 2010 following a request by her husband Tedias Tembo she asked the victim who told her that she was defiled by Mweemba a Police Officer. Thereafter, she went to report at Balmoral Police Station where she was given a Police report and referred to U.T.H.

PW2 also stated that she went to UTH where the victim was examined and thereafter the Doctor endorsed his findings on the Medical report.

PW3's evidence following a successful voire dire was that among her friends was Phinet Lifuna; that one day when she was with Phinet they met the appellant by the road side in Balmoral and he gave them K10,000.00 to change his money.

After changing the appellant gave Phinet K3000.00 and he gave her K500.00 so that she does not report that Phinet had been given money; and the appellant told Phinet to meet him at the Stream located at Balmoral.

The evidence of PW4 following a successful voire dire was that there was a time she went for overnight prayers at the United Church of Zambia. Around 20.00 hours as she was returning home she met the appellant. She however, managed to escape when he was pulling her towards Muhan's house.

On another day, the appellant found her by the roadside, and he pulled her to an incomplete clinic building where he undressed her by removing her skirt and pant, thereafter he made her lie down on the ground before he slept on her and had sex with her. She did not report to PW2 because she was scared.

On another day PW2 sent her to buy soap; on her way back she met the appellant who proposed love to her. On the day she was with PW3 they met the appellant who gave them K10,000.00 to change for him. After changing the appellant gave her K3,000.00 and he gave PW3 K500.00. She however,

did not go to meet the appellant at the Stream as he requested. Sometime later, she reported to PW1.

The evidence of PW5 was that on 7th December, 2010 he was allocated a docket of defilement in which PW4 was the victim to investigate. Acting on the docket he instituted investigations. During the investigations he visited the Scene, and Balmoral School in quest of gathering information since there was no birth record. Thereafter, he interviewed the witnesses and the appellant. Later, he arrested the appellant, under warn and caution in Nyanja the appellant denied the charge.

The appellants' evidence on oath as DW1 was that in the first week of April, 2010 there was an over night prayers at the United Church of Zambia which he also attended. About ten metres before reaching the church they found Phinet the prosecutrix coming from church heading in their direction. They however, went in the church and left before long.

DW1's further evidence was that the second time he met Phinet was between 09.00 and 10.00 hours when he was going into the compound to buy cigarettes she was in company of

three others. He met them near a house being constructed and a Contractor friend of his called him and he sent the children to go and buy for him cigarettes, he gave them K10,000.00. The children however later told him that there were no cigarettes.

At the time his friend had asked for K2,000.00 and he asked the children to go and change the money for him at the nearby make Shift Stand. Having changed the money, he allowed them to get the money so that his friend did not know the money that he had. The children gave him the change and asked for money for Chico biscuits and he gave them K3,000.00.

DW1 also stated that he heard rumours that he bought children Chico biscuits. A month later, he was charged. The trial Court after considering the evidence before it, found that there was corroboration that the offence was committed and that there was corroboration of the identity of the offender; and that between 1st August, 2010 and 30th November, 2010 the appellant did have carnal knowledge of the victim; and that the prosecution had discharged the burden of proof and as such had proved their case beyond all reasonable doubt. The trial

Court therefore found the appellant guilty of defilement and convicted him accordingly.

Since the trial Court had no jurisdiction to impose the minimum sentence prescribed by the law, it committed the appellant to the High Court for sentencing pursuant to **Section 138(1) of the Criminal Procedure Code, Chapter 88** of the Laws of Zambia. The High Court then sentenced the appellant to 15 years Imprisonment with hard labour.

Dissatisfied with his conviction the appellant has appealed to this Court advancing two grounds of this appeal, as follows:-

1. **The trial Court erred in law and in fact when it convicted the appellant in the absence of corroborative evidence.**

2. **The trial Court erred in accepting and considering the evidence of PW3 and PW4 being children of tender age whose evidence was accepted after defective voire dires were conducted.**

In support of the foregoing grounds of the appeal, Mr. Muzeng'a filed heads of arguments on behalf of the appellant.

In relation to the first ground of appeal, Mr. Muzeng'a pointed out that the evidence against the appellant is that given by PW4, a child of tender years; she alleges that she was defiled by the appellant on an unknown date; and that the

defilement allegedly took place at an incomplete clinic. Counsel contended that there is no witness who saw the appellant with PW4 leaving or going into the incomplete clinic on this material day or indeed any other day for that matter.

The case of ***EMMANUEL PHIRI -VS- THE PEOPLE*** [(5)] was relied upon where this Court held *inter alia* that:-

> **"In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the Court to warn itself is a misdirection."**

It was submitted that the foregoing, is a rule of practice requiring corroboration in sexual offences in general. Counsel argued that in the case at hand, there is further legal requirement in **Section 122 of the Juveniles Act** which provides that:-

> **"Where in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the Court, understand the nature of an oath, his evidence may be received though not on oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force.**

> **Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."**

Mr. Muzeng'a submitted that this is a statutory requirement for corroboration which cannot be satisfied by proof of evidence of something more. Further, Counsel submitted that this Court in the case of ***BERNARD CHISHA -VS- THE PEOPLE*** [(1)] observed that a child due to immaturity of mind is susceptible to the influence by third persons and as such their evidence requires to be corroborated. In any event, there is no evidence of something on the record.

Further, the Court was referred to the case of ***EMMANUEL PHIRI AND OTHERS -VS- THE PEOPLE*** [(2)] where the Court held that:-

> **"The "Something more" must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the Court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of accomplice implicating the accused. This is what is meant by "special and compelling grounds" as used in Machobane. [(1)]**
> **The modern decisions appear to be adopting a less technical approach to what is corroboration as a matter of law, and to be recognising that identification cases are analogous to, if not**

> **virtually indistinguishable from, corroboration cases. The question in all cases is whether the suspect evidence, be it accomplice evidence, evidence of a complainant in a sexual case, or evidence of identification, receives such support from the other evidence or circumstances of the case as to satisfy the trier of fact that the danger inherent in the particular case of relying on that suspect evidence has been excluded; only then can a conviction be said to be safe and satisfactory.**
>
> In Zambia the test is:
>
> **Was there corroborative or supporting evidence of such weight that the conclusion is not to be resisted that any Court behaving reasonably, moving from the undisputed facts and any findings of fact properly made by the trial Court, would, directing itself properly, certainly have arrived at the same conclusion?**

Mr. Muzeng'a argued that that the evidence from PW3 to the effect that the appellant gave PW3 and PW4 a K10,000.00 to change for him after which he gave K3,000.00 to PW4 and K500.00 to PW3 is not connected in any way to the allegations of defilement by PW4. Counsel submitted that it was not on the same day and it not clear whether or not it was before or after the alleged defilement. In any event, it was argued that the appellant in his defence explained the reason for giving the kids, PW3 and PW4 the money; there was therefore, nothing strange about his conduct, and to give a person some money

after sending them to do something for you, especially the young children.

It was Mr. Muzenga's submission that there is no corroboration as a matter of strict law for PW4's allegation that it was the appellant who had sexual intercourse, neither, are there any special and compelling grounds to rule out inherent dangers of false implication. It was further Counsel's submission that there is doubt, following PW4's own admission that she had sexual intercourse with a person called Bobo as to who actually perpetrated the unlawful act. It was argued that such doubt must be resolved in favour of the appellant; and that in the circumstances of this case, the only irresistible conclusion is that the appellant is not guilty.

Mr. Muzeng'a therefore, prayed that the Court upholds the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

In support of the second ground of the appeal, Counsel submitted that the questions that were asked by the Court during the voire dires appeal to show the inquiry by the Court was focused on ascertaining whether child witnesses possessed

sufficient intelligence and whether they understand the duty of speaking the truth; and the rulings of the trial Court following the voire dires appear to suggest that the child witnesses understood the nature of an oath even though no specific questions about the oath or the nature thereof were put to the child witnesses. Mr. Muzeng'a argued that such questions could have been among other questions: Do you know what an oath or swearing is? Do you understand the implications of giving false evidence on oath or do you know what would happen to you if you give false evidence on oath? And other related questions surrounding the nature of an oath.

Counsel contended that no such questions were put to the child witnesses. It was submitted that the voire dires which were conducted by the trial Court were defective.

In support, Mr. Muzeng'a cited the case of ***ZULU -VS- THE PEOPLE*** [4] where the Court laid down the proper procedure for conducting voire dire and held that:-

> **"The correct procedure under Section 122 of the Juveniles Act, Chapter 217 was as follows:-**
>
> **(a) The Court must first decide that the proposing witness is a child of tender years; if he is not, the Section does not apply and**

the only manner in which the witness evidence can be received is on oath;

(b) If the Court decided that the witness is a child of tender years, it must then inquire whether the child understand the nature of an oath; if he does, he is sworn in the ordinary way and his evidence received on the same basis as that of an adult witness;

(c) If having decided that the proposing witness is a child of tender years, the Court is not satisfied the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence, and that he understands the duty of speaking the truth; if the Court is satisfied on both these matters then the child's evidence may be received although not on oath, and in the event, in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is sexual one) there arises the statutory requirement of corroboration contained in the provision to Section 122 (i). But if the Court is not satisfied on either of the foregoing matters the child's evidence may not be received at all."

Mr. Muzeng'a submitted that from the record at pages 9 to 13 the learned trial Magistrate did not clearly comply with this procedure; she did not inquire as to whether PW3 and PW4 understand the nature of an oath, hence the rulings subsequent to the voire dires are defective. Counsel contended that failure to do so was a serious misdirection.

In support, the case of ***GOBA -VS- THE PEOPLE*** [3] was cited where the Court of Appeal held that, “when no proper voire dires is carried out the evidence of the witness should be discounted entirely.”

Mr. Muzeng’a submitted that since the evidence against the convict is that given by PW3 and PW4 both of whom are children of tender age, which evidence was improperly obtained, the conviction in respect thereof cannot be upheld.

Counsel contended that this is not a proper case for retrial as there is not other evidence on the record sufficient enough to warrant a conviction and due to passage of time, the appellant may not have a fair trial.

It was therefore, prayed that this Court upholds the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

Mrs. Matandala, Senior State Advocate on behalf of the respondent informed the Court that she would file in written submissions within 7 days. The Court accordingly gave Mrs. Matandala seven days in which to file her submissions.

Accordingly, Counsel filed respondent's submissions. In the said submissions Mrs. Matandala submitted that from the outset, the prosecution did prove its case against the appellant beyond any reasonable doubt.

Counsel concurred with the appellant's submissions that the evidence given by PW4 ought to have been corroborated given the nature of the offence. It was submitted therefore, that PW4's evidence was sufficiently corroborated both in relation to the identification of the appellant and in the commission of the offence. Counsel contended that to begin with the appellant was a well known man to PW4; and that the appellant did concede to this fact.

Mrs. Matandala argued that consequently the possibility of an honest mistake or false implication is ruled out; this knowledge adds to something more to corroborate the identity of the appellant. In support, the case of ***EMMANUEL PHIRI - VS- THE PEOPLE*** [(5)] was cited where we held *inter alia* that:-

> **"In a sexual offence there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the Court to warn itself is a misdirection."**

Mrs. Matandala submitted that the case at hand was evidently corroborated and met the statutory requirement in **Section 122 of the Juveniles Act** [(6)] (as it was before the 2011 amendment); and also PW4 identified the offender as the now appellant. Counsel further submitted that the trial Court had the opportunity to observe the demeanour of PW3 and PW4 in order to assess their reliability and credibility; and was better placed to make a conclusion on the same. It was argued that the trial Court believed the evidence of the prosecution witnesses PW3 and PW4 in arriving at its finding of fact in its judgment. The Court was referred to the case of ***LUMBWE -VS- THE PEOPLE, (1986) ZR 93*** where it was held *inter alia* that:-

> **"An Appeal Court will not interfere with a trial Court finding of fact on the issue of credibility unless it is clearly shown that the finding was erroneous."**

In responding to the argument relating to the commission of the offence, Counsel pointed out that PW4 did inform PW2 that she had been defiled by the appellant, when PW2 was told to check by her husband; this was after noticing PW4 behaved strangely. She narrated that she was defiled at the verandah of

an unfinished clinic building. And PW5 confirmed the existence of the Scene upon visiting it. It was further pointed out that PW4 mentioned that she was given some money by the appellant so that he would have her enticed her to be with the appellant and have sex in return with PW4.

Counsel argued that this evidence was not discredited by the appellant; in addition the medical evidence produced in the trial Court cemented the corroborative evidence of the commission of the offence.

Mrs. Matandala therefore, submitted that there was sufficient corroborative evidence to convict the appellant as charged. She added that for that reason this ground should fail.

In response to ground two of the appeal, Counsel submitted that the voire dires were not defective but meet the standard required at law, that the trial Court correctly recorded the questions and answers given by the juvenile witnesses in arriving and accepting their evidence; that the questions that were put to PW3 and PW4 were intended to establish whether the two witnesses being children of tender years possessed sufficient intelligence to understand the nature of giving

evidence on oath; and that the finding of the Court was in affirmative. Therefore, there was no defect in the manner the voire dires were conducted by the trial Court.

Counsel referred the Court to the case of ***ZULU -VS- THE PEOPLE*** [4] where it was held that:-

> **"That the inquiry as to whether a child understands the nature of an oath is through the conduct of a voire dire. In this case the voire dires were conducted.**

It was contended that ground two of the appeal, has no merit, therefore, it should be dismissed.

Mrs. Matandala submitted that the trial Court was on firm ground when it convicted the appellant on the evidence adduced in the Court below as the prosecution had proved the case beyond reasonable doubt. Counsel prayed that this conviction should be upheld by the Court and the appeal should be dismissed.

We have considered the appeal; the grounds of the appeal; the arguments in support and in response; the judgment of the Subordinate Court which has been appealed against and indeed the authorities that have been referred to.

In the first ground of the appeal, the trial Court has been attacked when it convicted the appellant in the absence of corroboration.

It has been contended in support that the evidence against the appellant is that given by PW4 a child of tender years; that there is no witness who saw the appellant with PW4 leaving or going into the incomplete clinic on the material day or indeed any other day for that matter. Reliance was placed on our holding in the ***EMMANUEL PHIRI*** case and the provisions of **Section 122 of the Juveniles Act**.

It was contended in response that the prosecution did prove its case against the appellant beyond any reasonable doubt; and that the evidence of PW4 was sufficiently corroborated both in relation to the identification of the appellant and in the commission of the offence.

The trial Magistrate was alive to the requirement of corroboration in sexual offences as she stated that, “in sexual offences there must be corroboration of both commission and the identity of the offender in order to eliminate the dangers of false complaint and false implication.” The trial Magistrate then

proceeded to highlight the evidence before the Court; the direct evidence from PW4 the prosecutrix that on an known date appellant defiled her from an incomplete clinic under construction in the night which evidence was not challenged by the appellant; following the alleged defilement appellant started making sexual advances and giving her money, gifts and asking her to meet him at awkward times and places. This evidence according to the trial Magistrate, was corroborated by PW3 who told the Court that the appellant at one time gave Phinet K3000 and was told to meet him at Balmoral Stream while she was given K500 so that she does not reveal what has transpired.

The appellant also alluded to that fact of giving money to PW3 and PW4 but added that he gave them the money after sending them to change money to give his Contractor friend and did not cross-examine PW3 and PW4 on this issue. The trial Court found that this Contractor friend is a fictitious person and the story is merely concocted. According to the trial Court in totality appellant failed to challenge the evidence of the State witnesses as far as the charged is concerned.

We have considered the totality of the evidence adduced before the trial Court. We cannot fault the trial Court for making the foregoing findings. Further, from the evidence the appellant either confirmed or did not dispute some of the issues.

He confirmed the meeting with the appellant following the night prayer meeting at the United Church of Zambia and as correctly found by the trial Court, he confirmed the giving of the money to PW3 and PW4. Where issues are confirmed or not in dispute corroboration is not necessary.

In relation to the provisions of **Section 122 of the Juveniles Act**, since PW3 and PW4 gave sworn evidence after a successful voire dire, their evidence for all purposes is considered on the same level as any other witness who gives evidence on oath. Therefore the provisions of the proviso to **Section 122** does not apply.

In the circumstances of this case and on the evidence adduced in this case, we cannot fault the trial Court for convicting the appellant as charged as there was sufficient corroborative evidence which includes direct corroboration and

odd coincidences. We therefore find no merit in the first ground of the appeal. It is, accordingly, dismissed.

In the second ground of the appeal, the appellant has attacked the trial Court for accepting and considering the evidence of PW3 and PW4 being children of tender age whose evidence was accepted after defective voire dires were conducted.

It was contended in support that the voire dires which were conducted by the trial Court were defective. Reliance was placed on the procedure that this Court laid down in ***ZULU -VS- THE PEOPLE***. (4)

In response it was submitted that the voire dires were not defective but meet the standard required at law.

We have considered the voire dires as conducted by the trial Court including the questions put to the child witnesses and the rulings of the trial Court. We are satisfied that the trial Court properly conducted the voire dires and properly ruled. We do not see why Mr. Muzeng'a has argued that they are defective. In the first place, the trial Court identified that PW3

and PW4 were children of tender years and that voire dires needed to be conducted to determine whether or not they possess sufficient intelligence to determine whether their evidence had to be given on oath or otherwise; testing questions were then asked; and thereafter the trial Court made rulings. The procedure therefore, complied with that which this Court laid down in the ***ZULU*** [4] case.

In the circumstances, we find no merit in ground two of the appeal. It is, accordingly, dismissed.

The two grounds of the appeal having failed, the appeal against the conviction equally fails and is dismissed as it lacks merit.

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M. E. Wanki,
SUPREME COURT JUDGE.

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M. Lisimba,
ACTING SUPREME COURT JUDGE.

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F. M. Lengalenga,

ACTING SUPREME COURT JUDGE.